

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of
2 Information Act; general records exemption for trade secrets created by a public body.

3 **Be it enacted by the General Assembly of Virginia:**

4 **1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:**

5 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

6 The following records are excluded from the provisions of this chapter but may be disclosed by
7 the custodian in his discretion, except where such disclosure is prohibited by law:

8 Trade Secrets created by a Public Body:

9 1. Any record created by a public body or an employee or agent of the public body to the extent
10 that the records (i) were created in connection with or for the purpose of conducting academic, medical,
11 investment, or scientific research or commercially exploiting such research for the financial benefit of
12 the public body, (ii) contain (a) a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
13 seq.), or material that would qualify as a trade secret were the public body a private business entity or
14 (b) are the personal working papers of a professor, instructor, researcher or student[NOTE: M Query: is
15 this clause (b) too broad?]; and (iii) have not been the subject of any prior publication, been patented, or
16 otherwise been disclosed in any manner that is inconsistent with the continued need to shield the
17 information from public disclosure.

18 Nothing in this subdivision shall be construed to require the production of computer software in
19 the possession of a public body that is (1) otherwise available to the public as a product offered on a
20 commercial basis, (2) designated for the specific use of the public body in carrying out its operations, or
21 (3) an operating system that is being used to conduct the regular business of the public body.

22 Existing 2014 § 2.2-3705.6 Provisions

23 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
24 132.4 or 62.1-134.1.

25 2. Financial statements not publicly available filed with applications for industrial development
26 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

27 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
28 promise of confidentiality from a public body, used by the public body for business, trade and tourism
29 development or retention; and memoranda, working papers or other records related to businesses that are
30 considering locating or expanding in Virginia, prepared by a public body, where competition or
31 bargaining is involved and where, if such records are made public, the financial interest of the public
32 body would be adversely affected.

33 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
34 239 et seq.), as such Act existed prior to July 1, 1992.

35 5. Fisheries data that would permit identification of any person or vessel, except when required
36 by court order as specified in § 28.2-204.

37 6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost
38 projections provided to the Department of Rail and Public Transportation, provided such information is
39 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
40 laws administered by the Surface Transportation Board or the Federal Railroad Administration with
41 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad
42 Administration.

43 7. Confidential proprietary records related to inventory and sales, voluntarily provided by private
44 energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy
45 contingency planning purposes or for developing consolidated statistical information on energy supplies.

46 8. Confidential proprietary information furnished to the Board of Medical Assistance Services or
47 the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of
48 Chapter 10 of Title 32.1.

49 9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue
50 and cost projections provided by a private transportation business to the Virginia Department of
51 Transportation and the Department of Rail and Public Transportation for the purpose of conducting

52 transportation studies needed to obtain grants or other financial assistance under the Transportation
53 Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is
54 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
55 laws administered by the Surface Transportation Board or the Federal Railroad Administration with
56 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad
57 Administration. However, the exemption provided by this subdivision shall not apply to any wholly
58 owned subsidiary of a public body.

59 10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade
60 secrets or proprietary information by any person who has submitted to a public body an application for
61 prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

62 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
63 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed
64 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private
65 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
66 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
67 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
68 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
69 by the responsible public entity; and

70 b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or
71 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 or
72 the Public-Private Education Facilities and Infrastructure Act of 2002, to the extent that such records
73 contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
74 seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that
75 are not generally available to the public through regulatory disclosure or otherwise; or (iii) other
76 information submitted by the private entity, where, if the records were made public prior to the
77 execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining
78 position of the public or private entity would be adversely affected. In order for the records specified in

79 clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make
80 a written request to the responsible public entity:

- 81 1. Invoking such exclusion upon submission of the data or other materials for which protection
82 from disclosure is sought;
- 83 2. Identifying with specificity the data or other materials for which protection is sought; and
- 84 3. Stating the reasons why protection is necessary.

85 The responsible public entity shall determine whether the requested exclusion from disclosure is
86 necessary to protect the trade secrets or financial records of the private entity. To protect other records
87 submitted by the private entity from disclosure, the responsible public entity shall determine whether
88 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would
89 adversely affect the financial interest or bargaining position of the public or private entity. The
90 responsible public entity shall make a written determination of the nature and scope of the protection to
91 be afforded by the responsible public entity under this subdivision. Once a written determination is made
92 by the responsible public entity, the records afforded protection under this subdivision shall continue to
93 be protected from disclosure when in the possession of any affected jurisdiction or affected local
94 jurisdiction.

95 Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed
96 to authorize the withholding of (a) procurement records as required by § 33.2-1820 or 56-575.17; (b)
97 information concerning the terms and conditions of any interim or comprehensive agreement, service
98 contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity
99 and the private entity; (c) information concerning the terms and conditions of any financing arrangement
100 that involves the use of any public funds; or (d) information concerning the performance of any private
101 entity developing or operating a qualifying transportation facility or a qualifying project.

102 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local
103 jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying
104 transportation facility," "responsible public entity," and "private entity" shall mean the same as those

105 terms are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education
106 Facilities and Infrastructure Act of 2002.

107 12. Confidential proprietary information or trade secrets, not publicly available, provided by a
108 private person or entity to the Virginia Resources Authority or to a fund administered in connection with
109 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such
110 information were made public, the financial interest of the private person or entity would be adversely
111 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of
112 confidentiality.

113 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or
114 confidential proprietary records that are not generally available to the public through regulatory
115 disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under
116 Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a
117 promise of confidentiality from the franchising authority, to the extent the records relate to the bidder's,
118 applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies
119 or implementation of improvements, where such new services, technologies or improvements have not
120 been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such
121 records were made public, the competitive advantage or financial interests of the franchisee would be
122 adversely affected.

123 In order for trade secrets or confidential proprietary information to be excluded from the
124 provisions of this chapter, the bidder, applicant, or franchisee shall (i) invoke such exclusion upon
125 submission of the data or other materials for which protection from disclosure is sought, (ii) identify the
126 data or other materials for which protection is sought, and (iii) state the reason why protection is
127 necessary.

128 No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the
129 bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the
130 applicable franchising authority serves on the management board or as an officer of the bidder,
131 applicant, or franchisee.

132 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
133 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §
134 18.2-340.34.

135 15. Records and reports related to Virginia apple producer sales provided to the Virginia State
136 Apple Board pursuant to § 3.2-1215.

137 16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1,
138 submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery
139 Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

140 17. Records submitted as a grant or loan application, or accompanying a grant or loan
141 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-
142 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to
143 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or
144 research-related information produced or collected by the applicant in the conduct of or as a result of
145 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when
146 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of
147 such information would be harmful to the competitive position of the applicant.

148 18. Confidential proprietary records and trade secrets developed and held by a local public body
149 (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television
150 services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to the extent that
151 disclosure of such records would be harmful to the competitive position of the locality. In order for
152 confidential proprietary information or trade secrets to be excluded from the provisions of this chapter,
153 the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the
154 records or portions thereof for which protection is sought, and (c) state the reasons why protection is
155 necessary.

156 19. Confidential proprietary records and trade secrets developed by or for a local authority
157 created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to
158 provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of

159 Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive
160 position of the authority, except that records required to be maintained in accordance with § 15.2-2160
161 shall be released.

162 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
163 records of a business, including balance sheets and financial statements, that are not generally available
164 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business
165 and Supplier Diversity as part of an application for (i) certification as a small, women-owned, or
166 minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.) or (ii) a claim made by a
167 disadvantaged business or an economically disadvantaged individual against the Capital Access Fund
168 for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial
169 records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion
170 upon submission of the data or other materials for which protection from disclosure is sought, (b)
171 identify the data or other materials for which protection is sought, and (c) state the reasons why
172 protection is necessary.

173 21. Documents and other information of a proprietary or confidential nature disclosed by a
174 carrier to the State Health Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

175 22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including,
176 but not limited to, financial records, including balance sheets and financial statements, that are not
177 generally available to the public through regulatory disclosure or otherwise, and revenue and cost
178 projections supplied by a private or nongovernmental entity to the State Inspector General for the
179 purpose of an audit, special investigation, or any study requested by the Office of the State Inspector
180 General in accordance with law.

181 In order for the records specified in this subdivision to be excluded from the provisions of this
182 chapter, the private or nongovernmental entity shall make a written request to the State Inspector
183 General:

184 1. Invoking such exclusion upon submission of the data or other materials for which protection
185 from disclosure is sought;

- 186 2. Identifying with specificity the data or other materials for which protection is sought; and
187 3. Stating the reasons why protection is necessary.

188 The State Inspector General shall determine whether the requested exclusion from disclosure is
189 necessary to protect the trade secrets or financial records of the private entity. The State Inspector
190 General shall make a written determination of the nature and scope of the protection to be afforded by it
191 under this subdivision.

192 23. Records submitted as a grant application, or accompanying a grant application, to the
193 Virginia Tobacco Indemnification and Community Revitalization Commission to the extent such
194 records contain (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii)
195 financial records of a grant applicant that is not a public body, including balance sheets and financial
196 statements, that are not generally available to the public through regulatory disclosure or otherwise, or
197 (iii) research-related information produced or collected by the applicant in the conduct of or as a result
198 of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues,
199 when such information has not been publicly released, published, copyrighted, or patented, if the
200 disclosure of such information would be harmful to the competitive position of the applicant; and
201 memoranda, staff evaluations, or other records prepared by the Commission or its staff exclusively for
202 the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that
203 are consistent with the powers of and in furtherance of the performance of the duties of the Commission
204 pursuant to § 3.2-3103.

205 In order for the records specified in this subdivision to be excluded from the provisions of this
206 chapter, the applicant shall make a written request to the Commission:

- 207 1. Invoking such exclusion upon submission of the data or other materials for which protection
208 from disclosure is sought;
- 209 2. Identifying with specificity the data, records or other materials for which protection is sought;
210 and
- 211 3. Stating the reasons why protection is necessary.

212 The Commission shall determine whether the requested exclusion from disclosure is necessary to
213 protect the trade secrets, financial records or research-related information of the applicant. The
214 Commission shall make a written determination of the nature and scope of the protection to be afforded
215 by it under this subdivision.

216 24. a. Records of the Commercial Space Flight Authority relating to rate structures or charges for
217 the use of projects of, the sale of products of, or services rendered by the Authority if public disclosure
218 would adversely affect the financial interest or bargaining position of the Authority or a private entity
219 providing records to the Authority; or

220 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent
221 that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets
222 Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and
223 financial statements, that are not generally available to the public through regulatory disclosure or
224 otherwise; or (iii) other information submitted by the private entity, where, if the records were made
225 public, the financial interest or bargaining position of the Authority or private entity would be adversely
226 affected.

227 In order for the records specified in clauses (i), (ii), and (iii) of subdivision 24 b to be excluded
228 from the provisions of this chapter, the private entity shall make a written request to the Authority:

- 229 1. Invoking such exclusion upon submission of the data or other materials for which protection
230 from disclosure is sought;
- 231 2. Identifying with specificity the data or other materials for which protection is sought; and
- 232 3. Stating the reasons why protection is necessary.

233 The Authority shall determine whether the requested exclusion from disclosure is necessary to
234 protect the trade secrets or financial records of the private entity. To protect other records submitted by
235 the private entity from disclosure, the Authority shall determine whether public disclosure would
236 adversely affect the financial interest or bargaining position of the Authority or private entity. The
237 Authority shall make a written determination of the nature and scope of the protection to be afforded by
238 it under this subdivision.

239 25. Documents and other information of a proprietary nature furnished by an agricultural
240 landowner or operator to the Department of Conservation and Recreation, the Department of
241 Environmental Quality, the Department of Agriculture and Consumer Services or any political
242 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-
243 104.9, other than when required as part of a state or federal regulatory enforcement action.

244 26. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to
245 the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for such
246 trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this
247 exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii)
248 identify the data or materials for which protection is sought, and (iii) state the reasons why protection is
249 necessary.

250 27. Documents and other information of a proprietary nature furnished by a licensed public-use
251 airport to the Department of Aviation for funding from programs administered by the Department of
252 Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of
253 the public-use airport would be adversely affected.

254 In order for the records specified in this subdivision to be excluded from the provisions of this
255 chapter, the public-use airport shall make a written request to the Department of Aviation:

- 256 1. Invoking such exclusion upon submission of the data or other materials for which protection
257 from disclosure is sought;
- 258 2. Identifying with specificity the data or other materials for which protection is sought; and
- 259 3. Stating the reasons why protection is necessary.

260 #